United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL BRIEF

75-2128

To be argued by
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
BARRY WARREN KIBBE,

Appellant,

-against-

ROBERT J. HENDERSON,
Superintendent,
Auburn Correctional Facility,

Appellee.

Docket No. 75-2128

SUPPLEMENTAL BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel. BARRY WARREN KIBBE, Appellant, -against- ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, Appellee.	Docket No. 75-2128

SUPPLEMENTAL BRIEF FOR APPELLANT

THE ADMISSION INTO EVIDENCE OF STAFFORD'S EYEGLASSES, WHICH HAD BEEN TAKEN FROM APPELLANT'S CAR WITHOUT WARRANT OR CONSENT, VIOLATED THE FOURTH AMENDMENT PROSCRIPTION AGAINST UNREASONABLE SEIZURES.

Without a search warrant or appellant Kibbe's consent, the police seized George Stafford's eyeglasses from appellant's car.* The glasses were on the dashboard of the car,

The record is devoid of any support for Judge Foley's contention (Appendix "D" at 3) that the search and seizure was voluntary. What the record establishes, repeatedly, is that the police did not have appellant's consent to search (917, 919, 937, 945, 946). Basic facts as to the search and seizure are set forth in fn. at 7 of appellant's main brief.

and, according to Detective Verhay, he saw them through the car windshield. After this observation, Verhay got into the vehicle and seized the glasses as evidence.* At the time of the seizure the car had been impounded for the purpose of searching it.**

When the glasses were seized both appellant and Kroll were in police custody where they had been since before the car was discovered and towed to the sheriff's headquarters. Neither appellant nor Krall were picked up by the police in the vicinity of the car: appellant had been found at Nick and Corky's Bar, and Krall was found at work. In fact, it was appellant's description of the car which he gave to the police and his belief as to where the car was parked that led the police to the vehicle.

The car was parked at the curb in front of Krall's house. No application was made for a search warrant. Instead, Detective David Emerson was left to guard the car while two officers returned to headquarters and dispatched an Identification Bureau officer and a towtruck. While he waited for the

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Although Verhay's testimony on direct examination indicated that he was inside the car when he saw the glasses (see appellant's main brief, fn. at 7), this assertion was corrected on cross-examination when he explicitly stated that he first saw the glasses from outside the car. According to Emerson, this subsequent examination of the car's interior was prompted by Verhay's desire to help Emerson look for papers Emerson thought he might have lost earlier in the car (955). Verhay admitted that his purpose in examining the car was to look for fingerprints (935, 978).

**The car was situated in a quonset hut behind the sheriff's office.

truck to arrive, Emerson, secure in the knowledge that the car was safe, left his post in order to get a cup of coffee (924). When he returned, he found the car exactly as he left it. Before the car was towed,* it was photographed at the scene** (927).

The admission of the eyeglasses at trial, over defense objection, violated appellant's Fourth Amendment right against unreasonable seizures, and requires that the writ of habeas corpus be granted. Coolidge v. New Hampshire, 403 U.S. 443 (1971); Taylor v. United States, 286 U.S. 1, 5-6 (1932); Heffley v. Hocker, 420 F.2d 881, 882-883 (9th Cir. 1969); Pendleton v. Nelson, 404 F.2d 1074, 1077 (9th Cir. 1968); Niro v. United States, 388 F.2d 535 (1st Cir. 1968).

Searches and seizures conducted without a warrant are "per se unreasonable under the Fourth Amendment" except for a "few specifically established and well-delineated exceptions." Coolidge v. New Hampshire, supra, 403 U.S. at 455, citing Katz v. United States, 389 U.S. 347, 357 (1967); United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973). That

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*As an "accommodation" to a neighbor who, parked on the lawn in front of Krall's house was denied access to the street, Emerson got into appellant's car to move it. While in the car he saw Stafford's glasses, but attached no significance to them.

**Although the car was parked facing in the wrong direction, the State candidly admitted that the purpose of the tow was the search, and made no pretense of towing the car for this traffic infraction.

probable cause attends the search or seizure does not alleviate the requirement that there be prior judicial scrutiny:

> The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without careful prior determination of necessity [citations omitted].
>
> Coolidge v. New Hampshire, supra, 403 U.S. at 467. Emphasis in the original.

While the cases do require less to validate a warrantless search of a movable vehicle, as opposed to the search of a home or office, "[t]he word automobile is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, supra, 403 U.S. at 461; Cardwell v. Lewis, 417 U.S. 583, 591 (1974); Chambers v. Maroney, 399 U.S. 42, 50 (1970); Preston v. United States, 376 U.S. 364, 366 (1964).

> Neither Carroll ... nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords ....
>
> Chambers v. Maroney, supra, 399 U.S. at 50.

Consequently, in order for a warrantless seizure from an automobile to be valid, it, too, must come within one of the delineated exceptions to the warrant requirements. The seizure in this case fails to do so.

That the glasses were observed by Detective Verhay through the car's windshield does not, without more, bring the seizure

within the "plain view" exception. The predicate to the operation of the plain view doctrine is that there must be justification for the initial intrusion during which the evidence, once observed, could be seized. Coolidge v. New Hampshire, supra, 403 U.S. at 466.

Verhay's observation through the windshield provided, at most, probable cause* to believe that evidence sought was in the car. It did not, however, provide the necessary added legitimacy for the subsequent entry of the vehicle. Therefore, the seizure was unlawful. In Coolidge v. New Hampshire, supra, 403 U.S. at 468, the Supreme Court explicitly held, regarding the need for additional justification:

> This is simply the corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on the premises belonging to a criminal suspect may establish the fullest measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. Taylor v. United States, 386 U.S. 1; Johnson v. United States, 333 U.S. 10; McDonald v. United States, 335 U.S. 451; Jones v. United States, 357 U.S. 493, 497-

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*That Verhay had requisite probable cause to seize the glasses (Warden v. Hayden, 387 U.S. 294, 307 (1967)) is doubtful. Emerson testified that he perceived no significance in the presence of the glasses, and the record reveals no indication that Verhay knew any more than Emerson did, i.e., that the glasses belonged to Stafford as opposed to appellant or Krall.

498; Chapman v. United States, 365 U.S. 610; Trupiano v. United States, 334 U.S. 699.

Ibid. (Footnote omitted).

Both the First and Ninth Circuits have held that where an officer is outside a protected area, his "plain view" of the evidence sought does not, alone, justify the subsequent entry and seizure. Heffley v. Hocker, supra, 420 F.2d at 882-883; Pendleton v. Nelson, supra, 404 F.2d at 1077; Niro v. United States, supra, 388 F.2d at 538. In Heffley v. Hocker, supra, seized documents, in plain view on the floor of a car, were suppressed because there was no adequate justification for intrusion into the car without a warrant. See also United States v. James, 418 F.2d 1150 (2d Cir. 1969).*

Detective Verhay had no independent justification for entering the car.** Its impoundment and presence in the quonset hut was unlawful. Neither appellant nor Krall was

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*The District of Columbia Circuit's later decision in United States v. Wright, 449 F.2d 1355 (en banc 1971), is inapposite. There, the evidence -- a stolen transmission discovered in plain view in a garage -- was seized at the time of the arrest of three of the thieves, and there was an indication that the goods were about to be moved. One justification for the entry into the garage was that the seizure was to prevent removal of the evidence. Id., 449 F.2d at 1361.

**Verhay admitted that his purpose was to examine the car for fingerprints. Moreover, even if the intention was to help Emerson look for his lost papers, although altruistic of Verhay it did not make the entry lawful. Having seen the glasses before the entry for either reason, Verhay was precluded from seizing them under the plain view doctrine. Seizure pursuant to the plain view rationale is legal only when the observation at the time of the seizure is inadvertent. Coolidge v. New Hampshire, supra, 403 U.S. at 471.

anywhere in or around the vicinity of the car when they were picked up by the police, so that the seizure of the car could not be explained as incident to an arrest. Coolidge v. New Hampshire, supra, 403 U.S. at 455-457; Dyke v. Taylor Implement Manufacturing Co., 391 U.S. 216 (1968); Preston v. United States, supra, 376 U.S. at 367; see also Cardwell v. Lewis, supra, 417 U.S. at 591, n.7.

Similarly unavailing to the State is the "exigent circumstances" exception. In this case, the opportunity to search the car was anything but fleeting. United States v. Bradshaw, 515 F.2d 363 (D.C. Cir. 1975); compare Chambers v. Maroney, supra. The car was parked at the curb in front of Krall's house, as opposed to being on the open highway.* Moreover, there is nothing in the record to indicate that either appellant or Krall would have an opportunity to move the car. That the car was completely secure** can be seen

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*The car, when found, was no threat to public safety, thereby precluding the argument that the towing of it was in any way part of the police caretaking function. See Cady v. Dombrowsky, 413 U.S. 433 (1973); United States ex rel. LaBelle v. LaVallee, 517 F.2d 750, 755 (2d Cir. 1975). In fact, no pretense was made by the State that the car was being towed for any reason other than searching it. That Emerson was in the car in order to move it as an accommodation to a neighbor of Krall's is, at most, irrelevant. Apart from the doubtful legality of Emerson's entry, it was at most for a limited purpose, and no seizure of the glasses took place at that time.

**Compare Cardwell v. Lewis, supra, 417 U.S. at , where the Supreme Court found significant the indications in the record that the car was in danger of being moved by either Lewis' lawyer or a member of his family.

from the fact that Detective Emerson, while awaiting the arrival of the police tow truck, left his post to get some coffee. At the hearing, Emerson explained his actions:

> ... I knew they picked up Krall and Kibbe. So I went up the corner and had a cup of coffee. I came back and the car was still in the same place.
>
> (924).

Having ample opportunity to obtain a warrant, the police had no jurisdiction for seizing and impounding the car without one. Coolidge v. New Hampshire, supra.

The failure to get a search warrant on these facts renders the seizure of the car, and subsequently of the glasses, unlawful. The glasses were introduced at trial to establish that Stafford could not see when he was deposited by appellant on the side of the road. The evidence was relied upon to argue to the jury* that the failure to give Stafford his glasses not only "evinced a depraved indifference to human life," but also contributed to "causing" Stafford's death. Because the admission of the glasses into evidence was in violation of the Fourth Amendment proscription against unreasonable seizures, the petition for writ of habeas corpus must be granted.

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*It was also relied on by the New York Court of Appeals, which found the presence of the glasses in the car significant in assessing the sufficiency of the proof of causation (Appendix "C" at 410).

CONCLUSION

For the foregoing reasons and the reasons set out in the main brief for appellant, the order of the District Court should be vacated, the writ granted, and appellant ordered released unless he is re-tried within thirty days.

Respectfully submitted,

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